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NOS. 80-1538 AND 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY
Appellants

VS.

UNITED STATES
Intervenor-Appellee

AND

CERTAINED NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN
Appellees

JAMES PLYLER, ET AL.
Appellants

VS.

J. AND R. DOE, as Guardian Ad Litem for I. Doe, ET AL.
Appellees

Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit

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APPELLANTS' REPLY BRIEF

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SUBJECT INDEX

		Page
Index of Authorities		ii
I.	Preemption	2
II.	Equal Protection	6
	A. Level of Scrutiny	6
	B. The State's Interest	7
III.	Due Process	13
Conclusion		13

INDEX OF AUTHORITIES

Case	Page
Arrendondo v. Brockette, 648 F.2d 425 (5th Cir. 1981) *cert. pndg. sub. nom., Martinez v. Brockette*, No. 81-857	7,8
DeCanas v. Bica, 424 U.S. 351, (1976)	2,3,4
Exxon Corp. v. Governor of Maryland, 437 U.S 117, 130 (1978)	4
Goss v. Lopez, 419 U.S. 565 (1975)	13
Griswold v. Connecticut, 381 U.S. 479, 482 (1965)	12,13
Harrah I.S.D. v. Martin, 440 U.S. 194, 198 (1979)	13
Levy v. Louisiana, 391 U.S. 68 (1968)	7
Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1978)	13
Nebbia v. New York, 291 U.S. 505, 537 (1933)	13
Trimble v. Gordon, 430 U.S. 762 (1977)	7
Vlandis v. Kline, 412 U.S. 441 (1973)	8
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)	7
Wisconsin v. Yoder, 406 U.S. 205 (1972)	3
Other	
45 C.F.R. §233.50	5
8 U.S.C. §1101(15)(5)	4
20 U.S.C. §241(c)	5
20 U.S.C. §2762(b)	4
TEX.EDUC.CODE §11.13	13
Note, 31 Stanford Law Review 1069, 1080-84 (1979)	6

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In the various briefs filed by Appellees and *amici* on their behalf, numerous arguments are advanced in support of the decisions of the lower courts. Most of the pertinent arguments presented have been dealt with in the Brief for Appellants and those filed by *amici*, including the United States. However, certain characterizations of the record and arguments not accepted by the lower courts deserve response.

I.

Preemption

Appellees continue to press their argument that Section 21.031 is unconstitutional in violation of the Supremacy Clause.[1] Lacking any direct support for their assertion, Apellees rely principally upon congressional "silence." Appellees' Brief on the Merits, *Plyler v. Doe*, p. 51 (hereinafter "A.B.*Doe*"). It is true that Congress has not directly addressed the entitlement of illegal aliens[2] to a state-supported education. Much of Appellants' position concerning the application and manner thereof of the Equal Protection Clause is premised upon the State's understanding that, within the federal sphere, Congress, not the courts, is entrusted with the power and responsibility to determine what entitlement, if any, illegal aliens have to social benefits. However, if congressional "silence" says anything, it cannot be heard to proscribe Section 21.031.

> Indeed, Congress' failure to enact such general sanctions reinforces the inference that may be drawn from other congressional action that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.

DeCanas v. Bica, 424 U.S. 351, 360, n. 9 (1976).

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1. This issue is well addressed in the brief filed by the United States. Thus the point will not be belabored here.

2. Texas uses the term "illegal aliens" because it describes the class of aliens which are not afforded a right to a state-supported education.

DeCanas is, of course, the touchstone of this inquiry. The analysis must begin with the observation that education is clearly a field of legitimate state regulatory power. *E.g., Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972).

Section 21.031 is not "a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a *legal* entrant may remain." (Emphasis added.) *DeCanas v. Bica, supra,* at 355. Certainly one interest promoted by Section 21.031 is the prevention of inducements for unlawful entry and residence. However, the State is not attempting to determine who may enter the country and, in effect, is supporting the federal determination in that regard. Further, assertion of this interest is limited to its direct and immediate impact upon the principal basis for Section 21.031, that being the protection of the State's resources for the education of its lawful residents.

It is wholly unrealistic to contend that Texas does not have a cognizable interest in the prevention of inducements for an indeterminate number of children to enter the State illegally and enroll in its schools. It is clear that Texas' interest in this regard is local in nature; among the states, *only* Texas has a long international border with Mexico, each side of which is relatively densely populated. And only Texas must bear the burden of providing an education to children in its public schools. While this interest is also applicable to legal immigration, it is conceded that federal power to permit such immigration prevails. But there has been no such federal permission granted to Appellees; no purpose of the federal government, expressed or implied, is adversely affected by Section 21.031. In fact, the interest of Texas in preventing inducements for illegal entry and residence, as a corollary of its interests in preserving its educational resources, is fully in accord with

federal objectives. Texas has not attempted to intrude into areas of exclusively federal concern; Section 21.031 is not "a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *DeCanas v. Bica, supra,* at 356.

Nor is there any "clear and manifest purpose of Congress," 424 U.S. at 351, to preclude statutes such as Section 21.031. *Cf., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 130 (1978). The Immigration and Naturalization Act contains no language which even implies that Congress sought to prevent states from removing inducements for violation of its terms, and it is not easily ascertainable why Congress would desire to do so.

The final question is whether Section 21.031 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas v. Bica, supra,* at 363. Appellees assert that it does so with respect to federal education and immigration law.

In addition to those matters presented by the United States, it should be noted that Congress has considered the Elementary and Secondary Education Act since the enactment of Section 21.031 (A.B.*Doe,* p. 47, n. 76) and has failed to assert any objective concerning the education of illegal aliens. *c.f.,* 8 U.S.C. §1101(15)(5); Brief of Appellants, p. 19. Further, there is no purpose or objective to restrict to children actually in school the migrant count upon which *some* federal funds flow to the states. 20 U.S.C. §2762(b); J.A. C-79. While Texas may count illegal migrant children, Appellees' Brief, *In Re: Alien Children Education Litigation,* p. 53 (hereinafter "A.B. *In Re*"), Texas also loses millions of dollars by virtue of the counting of migrants in other states who usually reside in Texas. J.A. C-65. Moreover, it is highly dubious that Congress had as a purpose the education of illegal aliens when it enacted educational programs

which must supplement, not supplant basic educational programs, and which are funded at levels which permit services to less than 2/3 of eligible, lawfully resident students. *See*, Brief for Appellants, pp. 7, 10. *Cf.*, 20 U.S.C. §241(c); 45 C.F.R. §233.50. Finally, as noted by the United States (p. 20, n. 16), were Appellees correct, the remedy they seek is unauthorized.

The goal of Section 21.031 is to limit state-supported education to legal residents. At the time of trial the State's efforts to secure from the Immigration and Naturalization Service a complete list of federal documents authorizing entry and residence was still ongoing. Prior to the injunction in No. 80-1934, the State was in the process of issuing regulations on the subject in order to bring the "policy into compliance with whatever pieces of paper the INS would legally accept." Tr. No. 80-1934, March 6, 1980, p. 1289 (testimony of Commissioner Bowen). At the outset:

> The school districts were given all the information I had from INS. They were instructed repeatedly that this might not be an all-inclusive list; that there might be other legal documents that we had not enumerated in our letter; that if there were any question, they were to contact INS and find out what the status was and, if a child was legally in the country, then he was to be admitted.

Id. at 1304. The actual practice of the districts was consistent with this position or more liberal. J.A. D-27, D-89. Texas has absolutely no intention of excluding lawful residents from its schools. Section 21.031 does not interfere with the purposes of the INA.

II.

Equal Protection

A. *Level of Scrutiny*

If this Court determines that the Equal Protection Clause is applicable to illegal aliens in the context of social services[3], it does not compel strict scrutiny of Section 21.031. Elevated review has been urged on the basis that the children involved are without fault, and thus the classification is similar to illegitimacy. There have also been suggestions that race is involved and that the treatment of illegal aliens in general is relevant. *See, e.g.*, A.B.*In Re*, p. 6, n. 8. Appellants categorically reject any claim that Section 21.031 draws a classification based on race. Such a suggestion ignores the fact that all children must provide a birth certificate or similar documentation upon enrolling in school and that illegal aliens may be of any race. *See*, J.A. B-17. Further, to the extent that most illegal aliens in Texas are from Mexico, it should be borne in mind that it is the education of lawful resident Mexican-American children which is most protected by Section 21.031. *See generally*, J.A. D-1-31.

Illegal treatment of illegal aliens by their employers, although highly reprehensible, is not pertinent to the classification at issue. This treatment would not be affected by the denomination of illegal aliens as a suspect class; any exploitation at issue is already illegal. Texas is pleased to point out that the record indicates that illegal aliens, at least in the Texas metropolitan areas, do not appear to suffer from exploitation. J.A. B-19, D-104, E-39.

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3. *But see*, Brief of Appellants, p. 14 *et seq.*; *Note*, 31 Stanford Law Review 1069, 1080-84 (1979).

Nor do cases involving illegitimacy lead to a conclusion of heightened scrutiny here. Aside from the point that illegitimacy is not a suspect classification, the authorities compelling elevated scrutiny are based upon the lack of any rational reason to assume that restrictions based upon illegitimacy had any effect whatsoever upon the conduct sought to be deterred. *See, Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968). In contrast, in the case at bar, it is the children themselves who are impacting the State's educational system. There is no less onerous means to prevent that impact and the enhancement thereof due to further unlawful immigration than those utilized in Section 21.031. The parents in *Levy et al.* could not undo what was done in order to gain benefits for their children. Here, the children may remain in their native country or return thereto with or without their parents, and section 21.031 directly promotes such conduct. At most, the statute should be reviewed under the rational basis test.

B. *The State's Interest*

The primary and overall purpose of and interest underlying Section 21.031 is the protection of the State's resources from the indeterminable impact of educating the population of Mexico and other countries of origin. A subsidiary interest is in preventing the inducement of uncontrolled familial migration which magnifies that impact. The former and penumbra interest has been held sufficient to withstand strict scrutiny. *Arrendondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981), *cert. pndg. sub. nom., Martinez v. Brockette*, No. 81-857. Specifically, the interests held compelling were:

> A state has a legitimate interest in protecting and preserving the quality of its educational

> system and the right of its own *bona fide* residents to attend school on a preferred tuition basis. *Vlandis v. Kline*, 412 U.S. 441, 452-453... (1973). Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, i.e., the individual school districts.

Id. at 428.[4]

The issue in *Arrendondo* is the constitutionality of the requirement of Section 21.031(d) of the Texas Education Code that persons under 18 wishing to establish a residence apart from their parents or guardians must show that their presence in a school district is "not for the primary purpose of attending the public free schools."[5] In spite of variable mental gymnastics of Appellees concerning school finance, Section 21.031 promotes each of the interests which together were found compelling in *Arrendondo*.

Initially, the characteristics of the children at issue are such that they will by and large require special services and expensive educational programs which

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4. The support for Section 21.031 found in *Vlandis v. Kline* and its progeny is addressed in the *amicus* brief of Harlingen C.I.S.D., *et al.*, pp. 4-7. The State concurs with the arguments set forth therein.

5. It has been suggested that this provision obviates the State's difficulties concerning migration for purposes of education. A.B.*Doe*, p. 29, However, the provision, or any similar provision readily imaginable, does not address the problem of children moving from Mexico to live with an already present parent, the problem of families moving across the border for education, nor the problem of Mexican children being made the wards of resident relatives. *See also*, J.A. D-31-32.

already are in short supply. Appellees have attacked the State's description of these characteristics as applying to legal immigrants and myopically ignoring the extended duration of the presence of a number of illegal alien children. Nevertheless, the characteristics set forth (Brief of Appellants, pp. 8-10) are applicable in general to recent illegal immigrant children and a number of those who may have been present some period of time. Clearly Appellees desire to move the focus of the Court from the general characteristics of the class at issue to the carefully selected few who were named plaintiffs. Nevertheless, *no* witness testified that, as a group, these children will not have special needs. Appellees' attack is totally inconsistent with their position that characteristics *can* be assessed (A.B. *Doe*, p. 2, n. 8) and that these children will need special compensatory programs (A.B. *Doe*, p. 2, n. 4, pp. 48-49).[6] It can not realistically be doubted that, as a group, illegal aliens will cause an adverse impact upon the education of disadvantaged lawful residents.[7] Under our understanding of the English language, to agree that

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6. Appellees, in No. 80-1934, have offered no description of the class other than suggestions that "thousands" of the children formerly went to Texas schools and that the "vast majority . . . will eventually gain legal status." A.B. *In Re*, p. 18. Neither claim is accompanied by reference to the record, and neither is supported thereby. The latter is directly refuted. J.A. A-48 (majority have no chance to upgrade status - immigration counselor called by plaintiffs in *Doe*). With 20,000 as the immigration quota for Mexico (J.A. A-35) and 44,000 the yearly total quota and nonquota immigration from Mexico (J.A. A-37), it is indeed unlikely that a substantial number will become legal residents under the current law. *See*, Brief of United States, p. 13, n. 8.

7. It is suggested that the State could make do; for example, utilize alternative staffing patterns for bilingual education. A.B. *In Re* p. 15. These may be fine in the ideal; they are second-rate in practice. J.A. D-52-53, D-70. They reduce the attention students receive from a qualified bilingual teacher.

educability and need for bilingual education is not a "function" of immigration status (A.B. *In Re* p. 38) is to concede that it is not caused thereby; it is not to be so blind as to ignore that there are characteristics generally shared by illegal alien children.

Second, due in part to their special needs, illegal alien children will adversely affect the "financial integrity" of school districts where a significant number reside. While a district with few could conceivably lose more state money than it saves in reduced costs, it is silly to suggest that several thousand illegal alien children will not adversely affect Brownsville, which would have to build schools at local expense to house them (J.A. D-9-10), or Dallas, with a basic program financed by 58% local funds (J.A. D-32), or Houston,[8] which has a similar local share. While Dallas and Houston have declining enrollments, inflation and higher per pupil expenditures due in part to the special needs of urban children have not reduced their fiscal burden. J.A. D-42, D-91. Tyler I.S.D. may indeed lose some money through Section 21.031 although Appellees' witness agreed that he did not consider the cost of special programs in his analysis. J.A. B-37. Very simply, the statute would not remain on the books if it did not aid local districts. As the impact of the lower courts' orders grow with the numbers, the target school districts will be more and more seriously affected.

There is no question but that Section 21.031 preserves the State's resources. The argument in the *amicus* brief filed by Texas Impact (p. 36) based upon a fiscal note accompanying the consideration of the repeal of Section

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8. It is noted that Houston did not reduce the number of bilingual teachers after enactment of Section 21.031. A.B. *Doe* p. 35. Quite true. Houston still does not have enough bilingual teachers to serve its lawful residents.

21.031 is misconceived. There was no fiscal impact because the children were already in school pursuant to the lower courts' orders. Incidentally, the median of the *total* state contribution per child is approximately $1,500 per year. Tr. No. 80-1934, March 6, 1980, p. 1332. The $800 figure proffered by Appellees is the basic allotment without equalization aid and compensatory education funds. Specifically, the *average* state contribution for the last biennium was $1684 per year.

The State's interest in protecting its resources as well as those of its districts includes the interest in preventing inducements for unlawful immigration which taxes those resources. Trial counsel in *Plyler v. Doe* apparently believed she was on the horns of a dilemma between preemption and equal protection. However, if the views of trial counsel are material, she recognized that education was an inducement to illegal entry. Tr. No. 80-1538, December hearing, p. 343. Further, Appellees failed to note that trial counsel in No. 80-1934 requested a finding of fact that: "The provision of a free education in Texas would serve as an inducement for an increased flow in illegal immigration." R. No. 80-1934, V.I. at 178, n. 3 (*see*, A.B. *In Re* p. 35). The trial court's findings of noninducement are based entirely upon opinions and studies pertaining to adults; the findings are not logical, correct, nor supported by the record with respect to children of school age. *See*, J.A. A-52; Brief of Appellants, pp. 10-11. How many children may enter illegally for this purpose is undeterminable. J.A. D-13. In the absence of Section 21.031, only time would tell whether it would be several hundred per year or tens of thousands.[9] Unfortunately, the effects of the experiment

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9. The only reasonably reliable numbers presented in the study conducted by IDRA, Amicus Brief of Texas Impact, App. B, were collected only one month after the district court's order was issued. The State does not believe that subsequent counts set forth therein are accurate. Our information indicates a more rapid increase in some areas.

could not be reversed. If the flow increased geometrically, and there is some reason to believe it would (*see*, Amicus Brief of Federation for American Immigration Reform, pp. 4-6), Texas would be powerless to alter the demographic and educational results. There is no legal or practical reason to conclude unrealistically that Texas does not have a legitimate subsidiary interest in this regard.

Appellees have dwelled upon the sociological impact of the denial of an education to illegal alien children. A.B. *In Re* pp. 19, 43; A.B. *Doe, passim.* These arguments go to the wisdom of the statute. The Legislature and Congress are equally capable of weighing the balance between sociological costs and benefits.

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

Finally, although the State has not sought to justify Section 21.031 on the basis of relative tax contributions, Appellees have deemed it pertinent to their arguments. Actually, the contribution-consumption ratio for illegal aliens as a class or long-term resident illegal aliens in specific as compared to the average lawful resident or lawful residents similar in economic status is a complex question involving a number of parameters concerning which no solid data is available. The evidence relied upon by Appellees is based upon personal interviews and therefore suspect. There is reason to believe that the picture is not as rosy as that portrayed by Appellees. J.A. B-16, B-57-58, D-12, D-25, D-49. *See*, Amicus Brief of Federation for American Immigration Reform, p. 7, n. 26.

III.

Due Process

Appellees, in No. 80-1934, assert that Section 21.031 offends substantive requirements of the Due Process Clause. However, the substantive scope of the clause is generally limited to the "private realm of family life." *Griswold v. Connecticut, supra,* at 499; *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 499 (1978). In any event, Appellees cannot carry the burden of showing "no rational connection" between the operation of Section 21.031 and the legitimate interests of the State. *Harrah I.S.D. v. Martin,* 440 U.S. 194, 198 (1979); *Nebbia v. New York,* 291 U.S. 502, 537 (1933).

Further, it is claimed that Section 21.031 denies procedural due process citing *Goss v. Lopez,* 419 U.S. 565 (1975). First, the students in *Goss,* unlike Appellees herein, "plainly had legitimate claims of entitlement to a public education." *Id.* at 573. Nevertheless, Texas law provides for a hearing for Appellees to challenge the actions of the respective school districts. TEX.EDUC. CODE §11.13. Moreover, there is no evidence in the record that hearings are not available at the local level.[10] The record does not remotely support Appellees' contention. Nor does the contention support the order of the lower courts.

Conclusion

This is a difficult case, both politically and legally. The State's suggestion that the result herein could affect a variety of services provided by the State and

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10. Mr. Besterio's testimony did not state that no hearing was provided upon request. J.A. D-27.

cause their provision to illegal aliens regardless of federal law is based upon its view that the interests underlying Section 21.031 may not be surpassed with respect to *any* social service provided by the State. It is difficult to perceive what interest, other than ones analogous to those presented herein, would support restrictions upon the availability of other social services. It would be fully consistent with the appropriate role of the judiciary for this Court to defer to the legislative and administrative branches. The judgments of the lower courts should be reversed.

Respectfully submitted,

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